

October 28, 2005

MEMORANDUM

TO: CHAIR AND MEMBERS OF THE CHARTER COMMISSION

FROM:

RE: REQUEST TO AMEND THE CHARTER TO ALLOW THE ETHICS
COMMISSION TO IMPOSE CIVIL FINES

I. Summary

The integrity of government officials is critical to the public and to maintaining a democracy. The Honolulu Ethics Commission (Commission), like its counterparts throughout the country, is responsible for doing all it can to promote the highest standards of conduct in government. Yet, when compared to other ethics agencies, our Commission has no enforcement “teeth.” The Charter Commission has a unique opportunity to present this issue to the voters. The Commission requests that the voters determine whether it should have the authority to impose civil fines on City officers and employees who violate the ethics laws.

Over the last 5 years, the Commission has worked diligently to educate and train the City work force in ethics. Over 3,000 officers and employees have received mandatory ethics training. Another 2,000 have been presented a brief “Ethics Checklist” orientation. Nonetheless, no amount of training is likely to prevent violations when a public official believes he or she is

entitled to act outside the ethics laws. In cases of egregious conduct, the Commission should be allowed to consider levying a civil fine against the official. In addition, the possibility of a civil fine should deter unethical conduct at all levels of government because it makes the individual accountable for his or her actions.

The reasons for the Ethics Commission's request include:

1. Under current law,
 - a. Elected officials will receive little or no discipline for ethical misconduct;
 - b. City personnel may financially profit from ethics violations under certain circumstances; and
 - c. Appointing authorities may ignore Commission recommendations.
2. The authority to impose fines deters unethical conduct in public officials and promotes officials seeking advice from the Commission.
3. Ethics agencies in almost every state and many cities are empowered to impose civil fines on ethics law violators.

The wording of the proposed amendment is enclosed as Attachment 1.

Should the Charter Commission present this issue to the voters and they pass the amendment, there are practical issues that will need to be resolved to effectuate the amendment. First, an ordinance addressing the criteria for determining whether a fine is appropriate, the amount of the fine and other details will be needed. Second, a moderate increase in funding will be needed to ensure that the Commission will be able to accord due process in its new role. Third, state law may have to be changed before civil fines may be effectively used.

II. The voters should determine whether ethics law violators may be fined by the Commission

A. Law violators may go unpunished under current law.

The Constitution of the State of Hawaii and the Honolulu Revised Charter both require the highest standard of conduct from all in public service in order to justify public trust in government.¹ The standards of conduct for City officers and employees are stated in the revised Charter and the revised ordinances.² These laws generally proscribe against the misuse of City resources for non-governmental purposes and creating or acting on conflicts of interest. The Commission is charged with training and advising City personnel on ethics issues, as well as investigating and hearing alleged breaches of these laws. After an investigation and hearing, the Ethics Commission may render an opinion that finds that the City officer or employee violated the ethics laws. In that case, it recommends discipline (*e.g.*, reprimand, probation, demotion, suspension or discharge) to the appointing authority.³ However, it is solely within the discretion

¹ Article XIV, Hawaii Constitution states in relevant part:

The people of Hawaii believe that public officers and employees must exhibit the highest standards of ethical conduct and that these standards come from the personal integrity of each individual in government.

Revised Charter of Honolulu (RCH), Section 11-101 reads:

Declaration of Policy --

Elected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct, to the end that the public may justifiably have trust and confidence in the integrity of government. They, as agents of public purpose, shall hold their offices or positions for the benefit of the public, shall recognize that the public interest is their primary concern, and shall faithfully discharge the duties of their offices regardless of personal considerations.

² The standards of conduct are contained in RCH Sections 11-101, *et seq.*, and Sections 3-8.1, *et seq.*, Revised Ordinances of Honolulu (ROH).

³ The “appointing authority” is usually the director of the department for which the officer or employee works, or, in the case of mayoral appointees, the Mayor, and Council appointees, the Council. Elected officials have no appointing authority.

of the appointing authority whether to implement the recommended disciplinary action. The Commission has no independent authority to sanction those who violate the ethics laws.⁴

Below, we describe three scenarios where serious misconduct may go unpunished under current law.

1. There is no effective discipline for elected officials.

There is a need for authority to levy civil fines against elected officials because there are no other effective remedies for ethics violations. Elected officials have no “appointing authority” that may take disciplinary action. The City Council does not have the power to censure its members for ethics violations.⁵ Neither the Mayor nor the Prosecuting Attorney has appointing authorities and, therefore, there is no one to compel discipline.

There are penalties for misconduct by an elected official. When an elected official violates the ethics laws, the violation is a basis for impeachment under the Charter.⁶ As a

⁴ RCH Section 11-106:

Penalties and Disciplinary Action for Violations --

The failure to comply with or any violation of the standards of conduct established by this article of the charter or by ordinance shall be grounds for impeachment of elected officers and for the removal from office or from employment of all other officers and employees. The appointing authority may, upon the recommendation of the ethics commission, reprimand, put on probation, demote, suspend or discharge an employee found to have violated the standards of conduct established by this article of the charter or by ordinance.

ROH Sec. 3-8.5:

Violation--Penalty.

(a) The failure to comply with or any violation of the standards of conduct of this article or of Article XI of the revised charter shall be grounds for impeachment of elected officers and for the removal from office or from employment of all other officers and employees. **The appointing authority may, upon the recommendation of the ethics commission, reprimand, put on probation, demote, suspend or discharge an employee found to have violated the standards of conduct established by this article.** Nothing contained herein shall preclude any other remedy available against such officer or employee. (Emphasis added.)

⁵ For example, RCH Section 3-107.1 states in part: “All councilmembers shall have the right to vote in council at all times.” This language appears to prevent censure, although committee assignments may be removed.

⁶ RCH Section 11-107 and ROH Section 3-8.5(a). RCH Sections 12-201 through 12-203 contemplate impeachment of the mayor, a councilmember and the prosecuting attorney, respectively. Impeachment, however, is not a legal option under the current Charter. As will be presented for the Charter Commission’s consideration, the impeachment law is invalid because it is based on the City delegating duties to the Hawaii Supreme Court.

practical matter, however, the impeachment process will not be used unless the violation is egregious. Grave public concern must be triggered in order to acquire the necessary petition signatures and to pursue the case. In addition, some conduct may be criminal as well as an ethics violation, as in the case of former Councilmember Rene Mansho.⁷ Yet, the vast majority of ethics breaches are not criminal. These relatively extreme penalties for misconduct are unsuitable for most ethics violations.

The penalty should fit the misconduct. There is a broad spectrum of unethical and criminal conduct against the public – ranging from unintentional mistakes to felonies. When an elected official commits a minor breach of the standards of conduct, a reprimand is sufficient. In the case of a theft, criminal charges and impeachment may be appropriate.

But what should be done about an ethics violation by an elected official whose behavior falls somewhere between a relatively insignificant ethics breach and criminal misconduct? Under present law, there is no intermediate discipline available. For example, suppose a councilmember requires a staff member to attend classes and take notes while the staff member is on City time. The councilmember may be scolded in the Commission’s advisory opinion, and Corporation Counsel might seek to recoup the money paid by the City to the staffer from the councilmember in order to make the City whole. Nevertheless, there is no law that would penalize the councilmember for his or her misconduct. From the councilmember’s viewpoint, the worst that could happen is he or she would have to reimburse the City.

Assuming the Charter is amended to include a lawful procedure for impeachment, our concern remains about its usefulness as a deterrent except in the most egregious cases.

⁷ Ms. Mansho violated Section 11-104, Revised Charter of Honolulu, by misusing approximately \$150,000 in city salaries paid to her Council staff for time she required them to work on non-city projects that solely benefited her, such as her political fundraisers. Ms. Mansho resigned her office shortly after the impeachment petition was filed and served one year in prison for felony theft.

In this example, the conduct is too inconsequential for impeachment and too serious for a simple reprimand. The authority to fine for such a breach by elected officials would ensure that the punishment is neither too gentle nor too severe, but fits the violation.

2. Financial gain resulting from misconduct may be retained.

City officers and employees may violate the ethics laws and retain the financial gain from their misconduct. In a recent case, a City officer appeared before a City agency on behalf of and paid by private interests. (City officers, except for board and commission members, may not represent private interests before City agencies. RCH Section 11-102(e).) Although the official profited from the violation, there was no means to force him to disgorge his profit.⁸ A civil fine could be used to ensure that a wrongdoer does not keep ill-gotten gains.

3. The appointing authority may ignore the Commission's recommended discipline.

After an investigation and hearing, the Ethics Commission may render an opinion that finds that the City officer or employee violated the ethics laws and recommend discipline. Whether or not the recommendation is implemented is solely within the discretion of the appointing authority.

Generally, the appointing authorities have followed the Commission's recommendations. Twice in last five years, however, recommendations for discipline stated in formal advisory opinions have been ignored.⁹ Failing to implement the recommendations undercuts the disciplinary process and the government's integrity. First, it negates the independent investigation and findings of the Commission. Second, it permits the appointing authority, without explanation, to preempt the Commission's expertise in ethics. As a result, misconduct

⁸ Advisory Opinion No. 2004-3 (March 3, 2004).

⁹ Advisory Opinion No. 291 (October 22, 1998) and Advisory Opinion No. 2001-3 (October 8, 2001).

goes unpunished and public confidence in government is eroded. Imposing a civil penalty independent of the appointing authority would ensure that the Commission's decision is not undermined and public confidence in the City government is enhanced.

B. Civil fines deter ethics transgressions.

The fining authority promotes accountability in public officials because it deters unethical conduct. The likelihood of a fine for a gross ethics breach should cause personnel to think twice before they skirt the ethics laws, especially those who may believe that violating the standards of conduct is worth the risk of possibly being caught and maybe being disciplined. In addition, it will stimulate employees and officers to ask the Commission for advice before they take action that may violate the laws.

C. The majority of ethics agencies use civil fines to ensure compliance and punish violators.

The Commission conducted a survey in 2004 to assess whether other jurisdictions employ civil fines. 30 out of the 34 state ethics agencies are authorized to impose fines on public officials.¹⁰ In two states where the ethics agencies do not have the authority to order civil fines, ethics violations are subject to criminal fines and incarceration. As to municipalities, 18 out of the 24 municipal ethics agencies sampled may impose civil fines. In addition, eight state ethics commissions have the power to fine both state and municipal personnel. (Tables 1 and 2 showing the approach of the jurisdictions and are enclosed as Attachment 2.)

The Hawaii State Ethics Commission is one of the few state agencies not authorized to impose fines, but it has sought the authority from the Legislature for the last two years. Kauai County allows its Board of Ethics to impose civil fines, but has not set a dollar amount for the

¹⁰ Not all states and cities have ethics agencies. Fines in the various jurisdictions range from \$500 to \$25,000 for each violation. Some jurisdictions set the amount of the fine at the greater of a set dollar amount or three times the value of the violation.

fine.¹¹ Maui County makes an ethics breach a criminal violation with fines up to \$1000 per violation.¹² Hawaii County has no provision for fines.

The proposed comments to the Model Law for Campaign Finance, Ethics and Lobbying Regulation drafted by the Council on Government Ethics Laws, Section 511.01(7) state:

The Agency must be provided with the authority to enforce its orders. The ability to directly impose significant monetary penalties against violators is the most potent tool for the effective enforcement of campaign finance laws. Most existing enforcement agencies possess such authority, and each agency considers this to be absolutely essential to maintain the integrity of the process. The threat of monetary sanctions is a deterrent to potential violators – but only if the amount of the penalty that may be assessed for a given violation is significant.

This statement is made in the context of campaign finance laws, but applies equally to ethics laws. Jurisdictions across the United States realize the need and effectiveness of the power to impose fines to prevent and remedy ethics violations.

III. Steps to be taken should a charter amendment pass

A. An ordinance will be needed to clarify the circumstances under which a public official may be fined.

The Charter amendment will create the framework for civil fine authority. If the amendment passes, the City Council will consider the more detailed issues in an ordinance.

These include setting forth factors relevant to whether a fine is warranted in a specific case and

¹¹ Section 20.04(C)(2), Kauai Charter, states: “Any violation of any of the provisions of this section shall constitute grounds for fine, suspension or removal from office or employment.”

¹² Section 2.56.010, Maui County Code: “Any person who violates any provision of the code of ethics of the county as contained in Article 10 of the Revised Charter of the County of Maui shall, upon conviction, be punished by a fine of not more than one thousand dollars for each violation.”

the dollar amount of the fine. State law sets forth the criteria to be used by county agencies when determining whether a fine should be imposed.¹³

The Hawaii Government Employees Association has raised some concerns over the implementation of the civil fine process. The City Council is the forum best suited for dealing with the issues of employment discipline “double jeopardy,”¹⁴ the impact of the change in law on current collective bargaining agreements and similar matters. Corporation Counsel has issued an opinion to the Commission stating that it believes that a Charter provision allowing the Commission to impose civil fines would be constitutional and would not necessarily violate the labor unions’ right to collective bargaining. The process by which a fine, as employee discipline, will be administered may be a matter for collective bargaining.

B. The Commission will protect the due process rights of those who may be fined.

The Commission will safeguard the rights of those who may be subject to a civil penalty by following the due process requirements, such as notice and the opportunity to be heard, mandated by Chapter 91, Hawaii Revised Statutes, Hawaii Administrative Procedures Act (HAPA). The Commission already follows HAPA and the few cases where a civil fine may be justified should require the same safeguards. In addition, the Commission will follow all applicable processes required by collective bargaining agreements. Of course, the potential for a fine may create more litigation. Should the Commission’s workload increase as a result of the amendment, it may require an increase of \$30,000 to \$60,000 in its annual budget.

¹³ Section 46-1.5(24)(D), Hawaii Revised Statutes, lists “the nature and egregiousness of the violation, duration of the violation, number of recurring and other similar violations, effort taken by the violator to correct the violation, degree of involvement in causing or continuing the violation, . . . and other extenuating circumstances.”

¹⁴ Employee discipline “double jeopardy” may occur if the City attempts to discipline an employee more than once for the same misconduct. An example would be where the Commission imposed a fine as the sole discipline and the appointing authority later orders suspension for the same misconduct. In the example, suspension and a fine that result from two unrelated administrative proceedings would appear to be unfair to the employee.

C. State law may have to be modified.

Section 46-1.5(24)(A), Hawaii Revised Statutes (HRS), permits each county to impose civil fines after reasonable notice and a request to cease or correct the violation has been made to the violator. State law also requires that the county provide an agency to which appeals of fines may be made. *See*, HRS Sections 46-1.5(24)(D) and (F).

HRS Section 46-1.5(24) originated to protect citizens who violated the building code or other permit requirements from having fines levied against them without notice of the violation. This is an important protection in the context of complex permitting laws and regulations that may be unfamiliar to members of the general public and where unintentional violations are likely to occur and be remedied once the violator is notified.

However, the cease and desist requirement is not sensible in the context of ethics violations. There are two reasons why this protection is unnecessary where City officers or employees commit an egregious violation of the ethics laws. First, City personnel are presumed to know the standards of conduct, are trained in those standards and should contact the Commission if they have any questions.¹⁵

Second, requiring a cease and desist notice before a fine could be levied would result in protecting even the most flagrant ethics abuse. For instance, a City employee could run a private business out of his office and make \$100,000 profit. Before the Commission could fine the employee, however, the Commission would have to notify the employee that his misuse of his City office violates the ethics law. Once he is notified of the violation, the employee would avoid any fine simply by moving his business out of his City office. The notice to cease amounts to a violator's "free pass." Current state law undermines the Commission's ability to impose

¹⁵ All supervisors, managers, elected officials and board and commission members receive mandatory ethics training per ROH Section 3-6.10 and training is available for all interested personnel on a quarterly basis.

finer because the misconduct will rarely continue after the notice is received. Therefore, the state law will have to be interpreted not to apply to government personnel ethics matters or will have to be amended.

IV. Conclusion

For the foregoing reasons, the Commission believes that the electors should be allowed to determine if the Commission should have the authority to impose civil fines for breaches of the standards of conduct.

The Commission would appreciate addressing the Charter Commission on this matter or otherwise aiding in its examination of the issues.

Section 11-106, Revised Charter of Honolulu, would be amended as follows:

Section 11-106. Penalties and Disciplinary Action for Violations --

The failure to comply with or any violation of the standards of conduct established by this article of the charter or by ordinance shall be grounds for impeachment of elected officers and for the removal from office or from employment of all other officers and employees. The appointing authority may, upon the recommendation of the ethics commission, reprimand, put on probation, demote, suspend or discharge an employee found to have violated the standards of conduct established by this article of the charter or by ordinance. The ethics commission may also impose civil fines established by ordinance for violations of the standards of conduct committed by officers and employees of the city.

Section 11-107, Revised Charter of Honolulu (RCH), would similarly be amended in the last paragraph:

Section 11-107. Ethics Commission –

* * *

The commission may impose civil fines, established by ordinance, against officers and employees of the city for conduct found by the commission to be in violation of the standards of conduct of this article and additional standards of conduct established by ordinance. The commission shall recommend appropriate disciplinary action against officers and employees found to have violated the standards of conduct established by this article of the charter or by ordinance. The appointing authority shall promptly notify the commission of the action taken on the recommendation.

TABLE 1

CIVIL FINES IN STATES WITH ETHICS AGENCIES

Alabama	\$1,000 or 3 times financial gain, whichever is greater
Arkansas	\$1,000
California	\$5,000
Connecticut	\$10,000
Delaware	No civil fines, but criminal sanctions apply for violations of ethics laws
Florida	\$10,000 ¹
Georgia	\$1,000
Hawaii	No civil fines
Illinois	\$5,000
Indiana	\$10,000
Iowa	\$2,000
Kansas	\$15,000
Kentucky	\$5,000
Louisiana	\$10,000 and 1.5 times the financial gain
Massachusetts	\$2,000
Michigan	No civil fines
Mississippi	Civil fines available through court
Missouri	\$5,000
Montana	\$1,000
Nebraska	\$2,000
Nevada	\$25,000
New Jersey	\$500
New Mexico	\$5,000
New York	\$10,000
Ohio	No civil fines, but criminal sanctions apply for violations of ethics laws
Oklahoma	\$1,000
Oregon	\$1,000 or 2 times the financial gain, whichever is greater.
Pennsylvania	3 times financial gain
Rhode Island	\$25,000
South Carolina	\$2,000
Texas	\$5,000 or 3 times financial gain, whichever is greater
Washington	\$500 or 3 times financial gain, whichever is greater
West Virginia	\$1,000
Wisconsin	\$1,000

¹ Agency recommends fines to governor or legislature.

TABLE 2

CIVIL FINES IN 24 CITIES OR COUNTIES WITH ETHICS AGENCIES

Atlanta	\$1,000
Buffalo	\$10,000
Detroit	No civil fines
Cook County, IL	\$5,000
San Diego	\$5,000
New York	\$10,000
Los Angeles	\$5,000 or 3 times value of violation, whichever is greater
San Antonio	\$500
Chicago	\$5,000
Seattle	\$5,000
San Francisco	\$5,000 or 3 times value of violation, whichever is greater
Oakland	\$1,000, but state ethics agency may fine local government officials up to \$5,000
Broward County (Fort Lauderdale, FL)	\$500
San Antonio, TX	\$500
Jacksonville, FL	\$10,000
Miami-Dade County, FL	\$500
San Jose	\$500, but state ethics agency may fine local government officials up to \$5,000
District of Columbia	\$10,000
King County, WA	No civil fines, but criminal penalties apply to ethics violations
New Castle County (Wilmington, DE)	No civil fines, but criminal penalties apply to ethics violations
Denver	No civil fines
Maui County	No civil fines, but criminal penalties apply to ethics violations
Kauai County	Civil fines authorized, but no amount set
Hawaii County	No civil fines